

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000347-001 DT

02/08/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

KENNETH M FLINT

v.

KATHERINE GRAY DEMOCKER (001)

LAURIE A HERMAN

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M-751-TR-2010-036966.

Defendant-Appellant Katherine Gray DeMocker (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends the trial court abused its discretion in finding (1) she had waived her right to be present at the trial, and (2) the State had complied with the discovery requirements, and further contends the trial court erred in not allowing her the right of allocution. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On November 24, 2010, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); failure to drive in one lane, A.R.S. § 28-729(1); following too closely, A.R.S. § 28-730; and driving in a bicycle path, A.R.S. § 28-815(D). On December 13, 2010, Jon M. Paladini filed a Notice of Appearance stating he was counsel of record for Defendant. Also on December 13, 2010, the trial court issued a Minute Entry setting the Pretrial Conference for January 28, 2011. On January 28, 2011, Mr. Paladini filed a Motion To Continue the Pretrial Conference. On that date, the trial court granted Mr. Paladini's Motion and set the Pretrial Conference for March 11, 2011. The trial court's Minute Entry mailed on January 28, 2011, contained the following statement:

You have the right to be present at all your court proceedings in your case. If this matter is eventually set to a trial and you do not appear at your trial, this non-appearance will be considered a waiver of your right to be present at your trial. The trial may be held without you, possibly resulting in a conviction with accompanying sentence, which will be enforced if necessary, by your arrest.

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At the bottom of the Minute Entry is the following language:

I acknowledge that I have read and understood the above.

Below that is Defendant's signature, with her printed name, address, and telephone number.

On March 11, 2011, Mr. Paladini filed a form Motion To Set Jury Trial. That form Motion contained a section with the heading Defendant's Acknowledgments, which included the following:

I will maintain frequent contact with Defense Counsel and understand that failing to appear at my Jury Trial Date may result in an arrest warrant, loss of posted bail, a trial in absentia, and defaulted civil citations.

In the box next to those Acknowledgments are initials that appear to be those of Mr. Paladini. The trial court then set the matter for a Mandatory Jury Trial Conference on June 2, 2011, and a Jury Trial on June 8, 2011.

On March 24, 2011, Mr. Paladini filed a Motion To Suppress Evidence contending the officer did not have reasonable suspicion to stop Defendant's vehicle. On March 28, the State filed a Response, and on April 6, the trial court set an Evidentiary Hearing for May 17, 2011. At the hearing on that date, Officer Anthony Cappucci testified about the events that occurred with Defendant on November 24, 2010. (R.T. of May 17, 2011, at 5–31.) After hearing arguments from the attorneys, the trial court denied Defendant's Motion To Suppress. (*Id.* at 39–40.) The trial court then reaffirmed the trial date of June 8, 2011. (*Id.* at 40.) Mr. Paladini said he had not received any disclosure from the State. (*Id.*) The trial court told Mr. Paladini to file another motion. (*Id.*)

On May 17, 2011, Mr. Paladini filed a Motion To Dismiss contending the State had not provided any disclosure. On May 18, the State filed a Response stating it had provided notice of its witnesses and exhibits on December 6, 2010, and further noting that disclosure form advised Defendant of the charges if she wanted copies of the documents. That Response also had attached a letter of April 6, 2011, sent to Mr. Paladini again advising him he could obtain copies by paying the copy fees. On May 18, 2011, the trial court set an evidentiary hearing for June 7, 2011.

At that hearing, Mr. Paladini stated he had not received copies of the State's documents. (R.T. of Jun. 7, 2011, at 42–43.) The prosecutor stated it had made the required disclosure and noted Mr. Paladini could have copies of whatever he wanted if he paid the copy fees. (*Id.* at 43–45.) Mr. Paladini responded by arguing the copy fee was unconstitutional. (*Id.* at 46.) The trial court stated it was going to continue the trial, which would give Mr. Paladini time to obtain whatever copies he wanted. (*Id.* at 50.) It further held the copy fee was permissible and denied Mr. Paladini's Motion To Dismiss. (*Id.*) On that same date, the trial court issued a Minute Entry setting the Mandatory Jury Trial Conference for August 11, 2011, and the jury trial for August 17, 2011.

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On August 2, 2011, Mr. Paladini filed a Motion To Continue. On August 4, 2011, the trial court issued a Minute Entry stating it would resolve Mr. Paladini's Motion To Continue at the Mandatory Jury Trial Conference for August 11, 2011. On August 15, 2011, Mr. Paladini filed a Motion for Disclosure and Request for Production—Blood test.

At the August 17, 2011, trial date, the trial court noted neither Defendant nor Mr. Paladini were present. (R.T. of Aug. 17, 2011, at 52.) The prosecutor noted he had spoken to Mr. Paladini at the calendar call on August 11, and discussed the fact that the other trials set for August 17 appeared to be going away and thus it appeared the present case would actually go to trial on August 17. (*Id.* at 54.) The prosecutor said he tried to call Mr. Paladini, but all he got was Mr. Paladini's answering machine. (*Id.*) The trial court had its bailiff make a statement, and she said she had spoken to Mr. Paladini at the jury trial conference on August 11 and told him he needed to be present for the trial on August 17, and had called his officer the previous day at 4:30 p.m. and told him he needed to be present for the trial. (*Id.* at 55.) She said she called his office twice that morning, the second time leaving a voicemail with her direct line, but had received no response. (*Id.*) The bailiff called Defendant to tell her of the trial date, but Defendant said her attorney had filed something and that she would not be there, and that the bailiff should call her attorney. (*Id.*) The trial court found both Defendant and her attorney had voluntarily absented themselves from the trial, and that the trial would proceed in their absence. (*Id.* at 56.) The result of the trial was the jurors found Defendant guilty of both DUI charges. (*Id.* at 155–56.) The trial court then set the sentencing for September 20, 2011.

On August 22, 2011, Mr. Paladini filed a Motion for New Trial, and on August 24 filed a First Amendment to Motion for New Trial, neither of which raised any issue about Defendant's not being present for the trial. At the hearing on September 20, 2011, Mr. Paladini said his client was not present at that hearing because she had food poisoning, so the trial court found her presence waived. (R.T. of Sep. 20, 2011, at 158.) Mr. Paladini argued Defendant was entitled to a new trial because the State had not made the required disclosure. (*Id.* at 158–62.) The prosecutor argued the State had made all required disclosure, and what Mr. Paladini was actually complaining about was the trial proceeded in Defendant's absence. (*Id.* at 162–64.) In rebuttal, again all Mr. Paladini argued was his claim that the State had not made the required disclosure. (*Id.* at 164–66.) The trial court noted it found that both Defendant and Mr. Paladini had voluntarily absented themselves from the trial, and denied the Motion for New Trial. (*Id.* at 166–67.)

The trial court held the sentencing on October 18, 2011. The State recommended the minimum fine and jail time. (R.T. of Oct. 18, 2011, at 169.) The trial court stated it was going to impose only the minimums, and told Mr. Paladini he could argue, but it could not go any lower than the minimums. (*Id.*) The trial court said it found Defendant responsible for the civil traffic charges, but was going to suspend sentence on those. (*Id.* at 169–70.) After going through all this, the trial court asked Mr. Paladini if there was anything else to be heard, and Mr. Paladini said there was not. (*Id.* at 170.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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II. ISSUES.

A. *Did the trial court abuse its discretion in finding Defendant had waived her right to be present at trial.*

Defendant contends the trial court abused its discretion in finding she had waived her right to be present at trial. The Arizona rule provides as follows:

Except as otherwise provided in these rules, a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it. The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear.

Rule 9.1, ARIZ. R. CRIM. P. On this issue, the Ninth Circuit has said the following:

. . . A defendant's knowing, intelligent and voluntary absence from his trial acts as a waiver of his Sixth Amendment right to confrontation. . . . When, after sufficient notice, a defendant voluntarily absents himself from any proceeding, he waives any right he has to be present at that proceeding.

. . . .

Brewer argues that the inference of voluntariness created by Rule 9.1 is unconstitutional. We disagree. A waiver is an intentional relinquishment or abandonment of a known right or privilege. Rule 9.1 provides for voluntary waiver because it requires the defendant to have notice of his trial date. The rule provides for a knowing and intelligent waiver because the defendant must have been told of his right to be present and warned that the trial would proceed in his absence. It requires that the defendant be made aware of his right to attend and the adverse consequences that would follow should he fail to do so before the inference of voluntariness would attach. We hold that the rule comports with the requirements of a waiver of the defendant's constitutional rights provided that the defendant is afforded a hearing to determine whether his absence was, in fact, voluntary.

Brewer v. Raines, 670 F.2d 117, 119–20 (9th Cir. 1982) (citations and footnote omitted). The defendant's voluntary absence may be inferred by the defendant's conduct, thus the defendant need not have actual notice of the continued trial date if the circumstances show the defendant's own conduct caused the defendant not to know of the new trial date. *State ex rel. Thomas v. Blakey (Lugo)*, 211 Ariz. 124, 118 P.3d 639, ¶¶ 13–15 (Ct. App. 2005); *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (Ct. App. 1996); *State ex rel. Romley v. Superior Ct. (Ochoa)*, 183 Ariz. 139, 142–45, 901 P.2d 1169, 1172–75 (Ct. App. 1995).

Here Defendant signed an acknowledgment that she had the right to be present at all court proceedings, and if the matter was eventually set for trial and she did not appear, this non-appearance would be considered a waiver of her right to be present, and the trial could be held without her. This supports the trial court finding that Defendant waived her right to be present.

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Moreover, in the motions filed by Mr. Paladini after the trial and before the sentencing, he never made any claim that Defendant was unaware of the trial date and that holding the trial in her absence was error. Additionally, the trial court's bailiff spoke to Defendant prior to the trial, and Defendant never made any claim she did not know of that trial date. Defendant notes Rule 2.9 of the Code of Judicial Conduct prohibits a trial court and court staff from having *ex parte* communications with any party. If Defendant is of the opinion that trial court committed an ethical violation, she should present that matter to the Commission on Judicial Conduct. But this does not change the fact that Defendant told the trial court's bailiff she knew of the trial date and chose not to be there. The trial court therefore did not abuse its discretion in finding Defendant had waived her right to be present at trial.

B. *Did the trial court abuse its discretion in finding the State had complied with all applicable discovery requirements.*

Defendant contends the trial court abused its discretion in finding the State had complied with all applicable discovery requirements. The Arizona rules provide as follows:

a. Initial Disclosure in Felony Cases. Unless otherwise ordered by the court or provided by local rule, at the arraignment, or at the preliminary hearing, whichever occurs first, the prosecutor *shall make available to the defendant* all reports containing items listed in Rule 15.1(b)(3) and (4) that were in the possession of the attorney filing the charge at the time of the filing.

b. Supplemental Disclosure; Scope. Except as provided by Rule 39(b), the prosecutor *shall make available to the defendant* the following material and information within the prosecutor's possession or control:

Rule 9.1, ARIZ. R. CRIM. P. (Emphasis added.) These rules apply to disclosure in felony cases and do not state they apply in misdemeanor cases. Assuming they apply in misdemeanor cases, they provide the prosecutor "shall make available to the defendant" the specified material. Nowhere does any rule provide a defendant is entitled to copies, at the state's expense, of all discovery materials.

Defendant cites to the Arizona Constitution, which provides as follows:

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

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ARIZ. CONST. art. 2, § 24. Under that section, the only item for which a defendant has the right to a free copy is “the nature and cause of the accusation against him,” which would be the charging document. Moreover, even an indigent defendant may be required to repay to the county a reasonable amount to reimburse the county for the cost of the defendant’s legal services. A.R.S. § 11-584(C)(3). Defendant therefore was not entitled to a free copy of the State’s discovery material.

C. Has Defendant waived any issue about her right of allocution.

Defendant contends the trial court erred in not giving her the right of allocution. Failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154–55, 812 P.2d 626, 627–28 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). In the present case, at the end of the sentencing proceeding when the trial court asked if there was anything else to be heard, Defendant’s attorney said there was not. (R.T. of Oct. 18, 2011, at 170.) If Defendant or her attorney was concerned about the lack of allocution, they should have called that to the trial court’s attention, whereupon the trial court could have corrected any error. Because neither Defendant nor her attorney said anything to the trial court, this Court concludes Defendant has waived this issue.

Moreover, even if the trial court erred, Defendant is not entitled to relief on appeal if any error is harmless. In the present case, the trial court advised Defendant and her attorney it was going to impose the minimums available:

IN THE COURT: I am—I’m going to impose only the minimum sentencing.

Counsel, you can argue, but I can’t go any lower than the minimum.

(R.T. of Oct. 18, 2011, at 169.) Therefore, even if Defendant had made allocution to the trial court, it would not have changed the sentence she received. Thus, even if the trial court did err, any error was clearly harmless.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in finding (1) Defendant waived her right to be present at trial, and (2) the State had complied with its discovery obligations. This Court further concludes Defendant waived any issue about allocution, and any error in not providing allocution was harmless.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT